

Title VII and Sexual Harassment: Beyond Damages Control

Susan M. Mathews[†]

I. INTRODUCTION

The prohibition of employment discrimination based on sex was included in the Civil Rights Act of 1964 with little debate or even thought as to its possible enforcement.¹ It was not until 1986 that the Supreme Court recognized a hostile, sexually harassing work environment as a form of employment discrimination.² Despite the current recognition of sexual harassment as employment discrimination, however, the remedies available to the victims of such harassment have been inadequate.

This article addresses the various ways in which Title VII falls short of the goal of eliminating sexual harassment in the workplace. Previous articles have taken on various aspects of the problem, but in light of recent Congressional action surrounding the Civil Rights and Women's Equality in Employment Act of 1991,³ this seems an appropriate time to practically reassess which of Title VII's flaws can actually be corrected by legislation.

The proposed Act would amend Title VII to allow victims of sexual harassment to recover compensatory and punitive damages in some instances. This amendment would correct the glaring inadequacy of available relief under present anti-discrimination law. Currently, Title VII offers only injunctive relief and restitution for economic injuries such as lost wages. Thus even those sexually harassed women who succeed in Title VII suits are rarely compensated for the actual nature and extent of the harms that they suffer.⁴ In particular,

[†] Associate, Powell, Goldstein, Frazer & Murphy, Washington, D.C.; J.D., Yale, 1991.

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1. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 238 (1985) (characterizing women as "accidental beneficiar[ies]" of Civil Rights Act); 110 CONG. REC. 2577-84, 2718-21 (1964). Rep. Smith, who proposed the addition of sex to Title VII, stated, "I do not think it can do any harm to this legislation; maybe it can do some good." *Id.* at 2577. He introduced the amendment with the hope of defeating the entire Title VII package. For a more detailed account of the original intent and enforcement of the first federal laws prohibiting sex-based employment discrimination, see Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-13 (1968).

2. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-69 (1986).

3. The bill, H.R. 1, 102d Cong., 2d Sess. (1991), was originally introduced on January 3, 1991 as the Civil Rights Act of 1991. 137 CONG. REC. E33 (daily ed. Jan. 3, 1991).

The Bush Administration has proposed an alternative "Civil Rights Act of 1991," introduced as H.R. 1375, 102d Cong., 2d Sess. (1991). The complete text appears at 137 CONG. REC. H1662 (daily ed. Mar. 12, 1991).

4. See sources cited *infra* note 7 for a discussion of the nature and extent of the harms suffered by

these victims are unable to seek compensatory damages for psychological or emotional injuries.⁵ Often the primary injury suffered by victims of sexual harassment is non-economic, particularly if the harassment involves a hostile work environment.⁶ Effects can include stress; high blood pressure; nausea; insomnia; weight loss; anorexia; and damage to self-esteem, personal relationships, and reputation.⁷ Ironically, because monetary relief is limited to restitution of economic losses, there have been cases where plaintiffs were able to show the existence of harassing behavior in the workplace, but were denied any relief because they could not demonstrate economic injury.⁸

In 1990, the U.S. Congress finally attempted to address the inadequacy of the relief provided by Title VII for instances of sexual harassment.⁹ The Civil Rights Act of 1990, ultimately vetoed by President Bush, proposed amendments to Title VII that would have provided for compensatory and punitive damages in certain sexual harassment cases.¹⁰ But the Act of 1990, like the

sexual harassment victims.

5. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308-09 (6th Cir. 1975) *vacated on other grounds*, 431 U.S. 951 (1977); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 835-36 (N.D. Cal. 1973). For a more detailed discussion of Title VII's failure to provide adequate remedy, see CAROLINE NEWKIRK, ELLEN VARGYAS & MARCIA GREENBERGER, *TITLE VII'S FAILED PROMISE: THE IMPACT OF THE LACK OF A DAMAGES REMEDY* (1990) (report by the National Women's Law Center); Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1611-19 (1990) [hereinafter Note, *Restoring Title VII*].

But see *Beesley v. Hartford Fire Ins.*, 717 F. Supp. 781 (N.D. Ala. 1989), *reconsidered at* 723 F. Supp. 635, 652 (N.D. Ala. 1989) (finding that sexual harassment plaintiff has legal right to jury trial and request for punitive and compensatory damages in Title VII case).

6. The federal courts and the EEOC currently recognize two types of sexual harassment, *quid pro quo* harassment, and hostile work environment. The hostile work environment is defined as an employment situation where an employee is subjected to pervasive, unwelcome sexual comments, derogatory remarks, touching, assault, or even rape. The harassing activities must be sufficiently pervasive or severe that they affect the terms or conditions of employment. *Quid pro quo* harassment is defined as the explicit or implicit use of submission to sexual requests as a condition of receipt or denial of a work benefit. See EEOC guidelines defining sexual harassment *infra* note 70.

7. See e.g., CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 47-48 (1979); U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 41 (1988); Ben Bursten, *Psychiatric Injury in Women's Workplaces*, 14 BULL. AM. ACAD. OF PSYCHIATRY & LAW 245, 245 (1986); Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling* 52 AM. J. ORTHOPSYCHIATRY 539, 541 (1982).

8. See, e.g., *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235, 1240 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 758 (1990) ("[S]ince [the plaintiff] cannot recover any award under Title VII, [the employer] must receive judgment even if there has been a violation of that statute."). In other Circuits judges have awarded nominal damages to plaintiffs in order to be able to award attorney's fees as well, or have recommended such a result in dicta. See, e.g., *Katz v. Dole*, 709 F.2d 251, 253 n.1 (1983); *Henson v. City of Dundee*, 682 F.2d 897, 905-06 (11th Cir. 1982); *Spencer v. General Elec.*, 697 F. Supp. 204, 219 (E.D. Va. 1988). Although this is a less perverse result, it does not begin to address the actual damage suffered by plaintiffs.

9. For a look at the bills as they were introduced, see H.R. 4000, 101st Cong., 2d Sess. (1990) and S. 2104, 101st Cong., 2d Sess. (1990) (both introduced on Feb. 7, 1990 and both named "The Civil Rights Act of 1990"). The bill that was recommended by conference committee and vetoed by President Bush on Oct. 22, 1990 was S. 2104.

10. The original amendment provided in both bills would have added to the relief section of Title VII (§ 706(g)) as follows:

With respect to an unlawful employment practice [other than disparate impact]—

(A) compensatory damages may be awarded; and

(B) if the respondent (other than a government, agency, or a political subdivision) engaged in

Act of 1991 which proposes the same amendments, would not resolve all of the problems facing both women in the workplace and sexual harassment plaintiffs in court.

This article argues that a damages amendment is, indeed, an important positive step. Title VII should be amended to improve the enforcement of its prohibition against sexual harassment and to provide more complete remedies to compensate victims for the actual damages they suffer. But while a new damages provision of Title VII, like the ones proposed in the Civil Rights Act of 1990 and again in the Civil Rights and Women's Equality in Employment Act of 1991, would be likely to provide more adequate and fair compensation to victims of sexual harassment, these victims would still face substantial obstacles in court, such as inappropriate standards of proof and use of plaintiffs' sexual history as evidence. These obstacles, however, could be addressed through use of evidentiary standards and burdens of proof tailored to the particular problems raised by sexual harassment cases.¹¹

Finally, this article examines the implementation issues created by Congress' recommended amendments to Title VII as well as my suggested reinterpretations of Title VII law and doctrine. I conclude that although there is a great deal of current and potential controversy surrounding these suggestions, full implementation of the amendments and my suggestions would not impose any unfair burdens on innocent employers. In addition, it is likely that the proposed changes would have a positive impact outside of the litigation context. The new remedies and standards would constitute a major improvement in achieving Title VII's dual goals of ending employment discrimination and making its victims whole.¹²

the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others, punitive damages may be awarded against such respondent in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include back pay or any interest thereon.

If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury.

The final compromise bill sent to the President included a limitation on damages proposed by Senator Boren. There would be no cap on compensatory damages, but punitive damages would have been limited to \$150,000 or the amount of compensatory damages and back pay, whichever was greater. 136 CONG. REC. S15,327 (daily ed. Oct. 16, 1990). In his veto message sent to Congress rejecting the Civil Rights Act of 1990, President Bush indicated that he was nonetheless in favor of "provisions creating new monetary remedies for the victims of practices such as sexual harassment [allowing additional equitable awards of up to \$150,000]." 136 CONG. REC. S16,457 (daily ed. Oct. 22, 1990).

11. By characterizing sexual harassment as a form of employment discrimination, legislators, judges, and theorists are making the claim that sexual harassment fits our social conception of discrimination that grew out of the consciousness-raising of the civil rights movement. But sexual harassment is neither just like nor completely analytically distinct from the paradigm case of racial discrimination, particularly with respect to the treatment of women of color. The implications of this tension in sexual harassment law will be discussed more fully *infra* notes 31-42 and accompanying text.

12. See, e.g., 118 CONG. REC. 7168 (1972) (section-by-section analysis introduced by Senator Williams to accompany Conference Committee Report on Equal Employment Opportunity Act of 1972 strongly reaffirming both purposes of Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

II. HOW DOES A COMPENSATORY AND PUNITIVE DAMAGES PROVISION IN TITLE VII COMPARE WITH OTHER CURRENTLY AVAILABLE REMEDIES?

Title VII is not the only potential source of compensation for victims of sexual harassment. However, examination of the major existing and proposed alternative remedies for sexual harassment at both the state and federal level demonstrates that a damages amendment to Title VII would provide a more equitable and efficient solution. Finally, this section takes a brief comparative look at the remedies available for racial harassment. Such a comparison is useful both as an examination of alternative remedies, and because remedies for racial harassment play a significant role in the public debate about damages for sexual harassment.¹³

A. State Anti-Discrimination and Workers' Compensation Laws

A few states have anti-discrimination laws in place that provide prohibitions against sexual harassment similar to those contained in Title VII.¹⁴ Most of these state statutes also share Title VII's approach of offering damages only for economic injuries suffered as a result of employment discrimination.¹⁵ Providing adequate compensatory and punitive relief for victims of sexual harassment through state discrimination laws would therefore require fifty-one separate legislative amendment efforts.

Workers' compensation laws in many states may provide some compensation for non-economic injuries which result from workplace discrimination.¹⁶ However, workers' compensation rarely offers make-whole relief, and in some states acts as a bar to tort claims arising out of harassing behavior at work.¹⁷ If victims of workplace harassment are not explicitly included in workers' compensation statutory language, they are often caught in a Catch-22. If the

13. See *infra* notes 31-42 and accompanying text.

14. For a list of the states which have such laws and the complete text of those law, see 3 EMP. PRAC. GUIDE (CCH 1991). For discussion of these laws as they compare to Title VII, see Sarah Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J., 35, 41-44 (1982); Note, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation* 48 OHIO ST. L.J. 1149, 1164-65 (1987) (hereinafter Note, *Inadequacies in Civil Rights Law*).

15. Wald, *supra* note 14, at 42. But see also *Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645 (E.D. Mich. 1982) (awarding sexual harassment victim damages for mental anguish and humiliation under Michigan's Elliott-Larsen Civil Rights Act in a claim combined with Title VII).

16. As originally conceived, workers' compensation laws developed as a system of strict liability to employers for accidents in the workplace. Some states have expanded these schemes to include all workplace injuries, but even this formulation of workers' compensation does not obviously include workplace harassment.

17. See Note, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1490 (1986) ("The major obstacle to holding an employer liable for sexual harassment is the workers' compensation system.") (hereinafter Note, *A Theory of Tort Liability*).

The view that sexual harassment is a work hazard under the possible jurisdiction of workers' compensation laws is not universally held. As the court in *Bennett v. Furr's Cafeterias* noted, "[I]t would appear to lie outside the bounds of reason to propose that the sort of sexual assault and harassment heretofore described and emotional trauma alleged to have been caused thereby result from risks inherent to the position of 'management trainee.'" 549 F. Supp. 887, 890 (D. Colo. 1982).

harasser was acting within the scope of employment, the only option may be partial relief under workers' compensation. But, if the harasser was not acting within the scope of employment, the doctrine of respondeat superior prevents the victim from suing the employer at all in tort.¹⁸

B. Tort Claims

Several articles have been written on the use of state tort claims as either an alternative or a companion to Title VII sexual harassment claims.¹⁹ Sexual harassment injuries have been tried under a long list of tort causes of action including assault and battery, intrusion/invasion of privacy, tortious interference with contractual relations, and intentional infliction of emotional distress. However, these ancient common law doctrinal standards do not fit easily with a wrong that has been legally acknowledged only in the last two decades. No common law theory yet provides an adequate remedy for the harms of sexual harassment, even in combination with a Title VII claim.²⁰

Some commentators have therefore advocated the creation of a new tort of sexual harassment.²¹ Such proposals obviously recognize an incompatibility between existing tort law and the injuries caused by sexual harassment. These authors also either explicitly or implicitly perceive an incongruity between sexual harassment and the very purposes of Title VII. In their view, sexual harassment is not group-based discrimination; it is an activity directed at particular individuals.²² A tort of sexual harassment would, in almost all instances, restrict liability to the employee who actually engages in the harassing behavior.

An amendment of Title VII to provide damages presents a more appropriate and effective approach to improving the remedy available to the victims of sexual harassment. Although the impact and injury of sexual harassment is often very personal, the activity involved is based upon discriminatory views about appropriate relationships between sexes, not individuals. "[I]t is a group-

18. The tort theory of respondeat superior permits recovery from an employer only if the tortious activity was committed by an agent of the employer within the scope of employment. See also C. NEWKIRK, E. VARGYAS & M. GREENBERGER, *supra* note 5, at 27-28.

19. See, e.g., Terry Dworkin, Laura Ginger, & Jane Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988); Jane Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651, 665-68 (1986); Note, *A Theory of Tort Liability*, *supra* note 17; Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151 (1979).

20. See C. NEWKIRK, E. VARGYAS & M. GREENBERGER, *supra* note 5, at 24-28; Dworkin, et. al, *supra* note 19, at 137-138; Note, *A Theory of Tort Liability*, *supra* note 17, at 1475-85.

21. See, e.g., Ellen Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990) (advocating tort of sexual harassment patterned on intentional infliction of emotional distress); Note, *A Theory of Tort Liability*, *supra* note 17, at 1486-88 (proposing tort theory of sexual harassment based on "reasonable woman" standard); Note, *Inadequacies in Civil Rights Law*, *supra* note 14 (calling for the creation of a federal tort of harassment making only individual harasser liable).

22. See Paul, *supra* note 21, at 346-53; Note, *Inadequacies in Civil Rights Law*, *supra* note 14, at 1157-58. See also *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting, denial of en banc rehearing) (Title VII is inappropriately applied to "individual harassment.").

defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared. Such an injury is *in essence* a group injury.”²³ And “[w]hen it has an impact upon fundamental employment decisions and upon the workplace atmosphere, sexual harassment is discrimination in employment.”²⁴ Regardless of whether the behavior in question is intended to intimidate or flatter, when these acts are unwelcome they interfere with the targeted woman’s ability to participate fully in the workplace and reinforce her social position of sexual vulnerability. Inclusion of sexual harassment within Title VII most appropriately places emphasis on its social pathology characteristics.

An additional concern is that employers are the actors in the best position to eliminate sexual harassment in the workplace,²⁵ yet they would not be held liable for harassment under a sexual harassment tort because of the doctrine of respondeat superior.²⁶ Since employers are likely to be the only potential defendants with adequate resources to pay actual damages, there is little hope for full compensation of all injuries without being able to extend liability to employers. Furthermore, so long as employers can shield themselves from liability simply by adopting a policy statement placing sexual harassment beyond the scope of employment, there is little incentive for employers to take a more active role in eliminating workplace harassment.

Finally, a formula for proving a sexual harassment case has already been established by the federal courts,²⁷ whereas a tort of sexual harassment would have to be established individually in each of the fifty states and the District of Columbia. In fact, the victims of sexual harassment who are currently making tort claims in combination with Title VII claims are doing so primarily in order to obtain compensation for non-economic injury and/or a jury trial that are otherwise unavailable. The proposed Civil Rights and Women’s Equality in Employment Act of 1991 would correct both of these shortcomings.²⁸

C. Section 1983 Claims

Some victims of sexual harassment may currently be able to make a federal claim for compensatory and punitive damages under 42 U.S.C. § 1983, which

23. C. MACKINNON, *supra* note 7, at 172.

24. *Id.* at 208 (footnote omitted).

25. For discussion on this point, see *infra* note 67 and accompanying text.

26. See *Hunter v. Countryside Assn. for the Handicapped*, 710 F. Supp. 233 (N.D. Ill. 1989) (No liability of employer for torts of supervisor who had not acted “in furtherance of employment” when he raped plaintiff.).

27. This is not to say that improvements in that formula could not be made. The doctrinal inadequacies of sexual harassment proof and liability standards under Title VII will be discussed *infra* notes 70-95 and accompanying text.

28. Damages are discussed *infra* at notes 52-69 and accompanying text. Jury trials are discussed *infra* notes 100-105 and accompanying text.

also provides a right to a jury trial.²⁹ These types of claims are limited to situations in which the state is the employer because the discrimination must occur "under color of state law." But, because of sovereign immunity, the state itself can not be the defendant in these cases. Relief is therefore available only to harassed women who work for some agency or subdivision of the state government in which the employer is a person and not the state per se.

Additionally, a violation § 1983 requires a showing of discriminatory intent, a requirement ostensibly not present under Title VII. The intent requirement, combined with the restriction of § 1983 to those actions occurring "under color of state law," prohibits a finding of vicarious liability for intentional harassment by a co-worker.³⁰ Section 1983 thus provides only a very narrow protection and opportunity for remedy.

D. Remedies for Racial Harassment

Race-based discrimination has been the paradigm for federal anti-discrimination law and judicial doctrine. One of the major theoretical problems of sexual harassment doctrine is that it does not completely conform to this established paradigm.³¹ Some of the incongruities between the remedies for racial and sexual harassment were addressed by Congress for the first time during the debate surrounding the Civil Rights Act of 1990. Comparisons of the legal remedies available for racial and sexual harassment have been very prominent in the debate surrounding the Act.³² Some of these comparisons sound very much like the debates surrounding the inclusion of sex in Title VII of the Civil Rights Act of 1964. At that time, Martha Griffiths suggested on the floor of the House of Representatives that if sex were left out of the Act, Black women would become more privileged than white women.³³ In this section I suggest a less pernicious justification for equalizing the remedies available for all employment discrimination in violation of Title VII.

Unlike the other groups protected by Title VII, victims of racial discrimination have traditionally been afforded the opportunity to seek compensatory and punitive damages for harassment on the job through 42 U.S.C. § 1981, a

29. 42 U.S.C. § 1983 provides a private cause of action for individuals who are deprived of federally protected rights by actions under color of state law.

30. See *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986).

31. This is not to suggest that there are no important similarities between race and sex discrimination. Much of the impact of Catharine MacKinnon's groundbreaking book, *Sexual Harassment of Working Women*, stemmed from its successful use of analogies to race-based discrimination.

Among the most important differences between race and sex discrimination cases are the special evidentiary problems presented by sexual harassment cases. These are discussed *infra* at notes 70-82, 89-95 and accompanying text.

32. See, e.g., Steven Holmes, *Rights and Business Groups Seek Pact on a Job Bias Bill*, N.Y. Times, March 16, 1991, at A11, col. 1; Richard Berke, *Partisan Fights Erupt on Rights Bill*, N.Y. Times, March 13, 1991, at A22, col. 4; Adam Clymer, *Bush Proposes an Alternative Rights Bill*, N.Y. Times, March 2, 1991, at A10, col. 4.

33. 110 CONG. REC. 2578-2580 (1964).

Reconstruction Era non-discrimination statute.³⁴ The Supreme Court in *Patterson v. McLean Credit Union*³⁵ in 1989 rejected this interpretation, ruling that harassment on the job does not impact the statutorily protected freedom to contract. However, the decision did leave in place § 1981's prohibition against race-based discrimination in hiring and firing decisions.³⁶ Although the Civil Rights and Women's Equality in Employment Act of 1991 would restore the original understanding that harassment on the job is included within the provisions of § 1981, it would not extend the protections of this statute to any other groups.³⁷ Despite the inapplicability of § 1981 to sexual harassment, the proposed damages amendment to Title VII would represent a clear Congressional policy statement that all victims of prohibited forms of discrimination, especially sexual discrimination, are deserving of federal remedy for all of their discrimination-related injuries.³⁸

In addition, because of the "tendency to treat race and gender as mutually exclusive categories of experience and analysis,"³⁹ combined claims of racial and sexual discrimination are problematic under the existing bifurcated remedy system. Women of color face jurisdictional problems in claiming coverage

34. 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

Section 1981's coverage of race-based employment discrimination is not completely coextensive with Title VII. Whereas Title VII only applies to employers with more than fifteen employees, § 1981 applies to all employment situations. Also, Title VII's statute of limitations is shorter.

It is important to note that because the remedies provided are not just equitable, jury trial is available under § 1981. In a notable recent decision, the Ninth Circuit ruled that when a § 1981 claim is combined with a Title VII claim, the Seventh Amendment requires the court to follow the jury's factual determinations in deciding Title VII-based legal claims. *Miller v. Fairchild Indus.*, 885 F.2d 498 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990).

35. 109 S.Ct. 2363 (1989).

36. The Court also suggested in dicta that other employment situations, such as decisions regarding substantial promotions, rising to the level of altering the nature of the contractual employer-employee relationship remain covered under § 1981. *Id.* at 2377. But this conception does not seem to include any harassment situations.

37. The argument has been made by one commentator that § 1981 protections must logically be extended to sex-based discrimination because of the Supreme Court's decision in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) to extend § 1981's coverage to whites. See Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 355-58 (1977). However, it now seems highly unlikely that courts will take that step on their own.

38. See *Hearings on S. 2104 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 101st Cong., 2d Sess., 12 (Feb. 27, 1990) (testimony of Marcia Greenberger, managing attorney of the National Women's Law Center) (available from the National Women's Law Center) [hereinafter Greenberger testimony].

The change of name of the bill to the Civil Rights and Women's Equality in Employment Act is apparently an attempt to emphasize the extent to which the bill is designed to help women. See Berke, *supra* note 32, at A22, col. 5. However, the new name also has the unfortunate consequence of suggesting that women's equality in employment is not a civil rights issue.

39. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139, 139. See generally BELL HOOKS, *AIN'T I A WOMAN* (1981) (historical discussion and analysis of inseparability of racism from sexism with respect to African American women).

under § 1981, as well as theoretical problems describing their discrimination within a legal regime that treats sex and race as separately and differently protected categories.⁴⁰ An amendment which provides the same remedies for all intentional discrimination prohibited by Title VII would make it easier for women of color, who are particularly likely to experience employment discrimination,⁴¹ to gain compensation for the full extent of their discrimination-related injuries.⁴²

III. ECONOMIC CONSIDERATIONS

Most of the objections to a damages provision of Title VII are cast in economic terms. Business organizations and other commentators have argued that the availability of compensatory and punitive damages would place an unfair burden on employers, who are often not responsible for the harassing behavior.⁴³ Many additionally have argued that juries will be prone to grant damages far in excess of the actual injury, and that many uninjured workers nonetheless will file lawsuits because of the potential lure of a large payoff.⁴⁴

Proponents of the measures contained in the 1991 legislation also have argued that available damages under Title VII must be increased to give employers adequate incentive to eliminate harassing employment conditions.⁴⁵ This section examines the merits of these opposing economic considerations.

A. *The Economic Effects of a Sexually Harassing Work Environment*

It is impossible to measure precisely the economic impact of sexual harassment in the American workforce at present. However, there are several indications that sexual harassment is responsible for a major loss of productivity to many employers. Current estimates suggest that between forty-two and eighty percent of American women have experienced sexual harassment at their workplace.⁴⁶ Victims can suffer from severe physical and psychological

40. Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1468-78 (1989) [hereinafter Note, *Black Women's Experiences*].

41. Crenshaw, *supra* note 39, at 141-52.

42. As long as compensation is not available for injuries related to sex-based discrimination, a woman of color plaintiff in a § 1981 case is disadvantaged in comparison with men of color. A defendant can theoretically escape liability altogether if he successfully argues that particular injuries at issue are related to sex-based discrimination as opposed to race-based discrimination. See Greenberger testimony, *supra* note 38, at 10.

43. See, e.g., Holmes, *supra* note 32, at A11, col. 3 (Business Roundtable advocates limit of \$100,000 for harassment and \$150,000 for cases of "wanton, willful and egregious discrimination"); Paul, *supra* note 21, at 364 (employer should be viewed as ancillary victim of harassment).

44. Sharon LaFraniere, *Rights Bill Would Alter Workplace: Measure Allows More Plaintiffs to Seek Damages in Job-Bias Cases*, Wash. Post, June 8, 1990, at A1, col. 4.

45. See, e.g., Greenberger testimony, *supra* note 38, at 9-10; Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 104 (1984-85) [hereinafter Note, *Employer Liability*].

46. See Donald Maypole, *Sexual Harassment at Work: A Review of Research and Theory*, 2 AFFILIA 24 (1987); Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual*

problems like headaches, high blood pressure, insomnia, and anorexia.⁴⁷ Studies have demonstrated that harassment at work leads to low morale, high absenteeism, and general reductions in productivity.⁴⁸ High levels of sexual harassment also have been linked to the increased unionization of predominantly female job categories, indicating women's desire to alter the power dynamic in the workplace.⁴⁹ Harassment is both more prevalent and more severe in traditionally male occupations.⁵⁰ The especially frequent incidence of harassment in traditionally male occupations has contributed to women's reluctance to take and keep those jobs. Any reduction in the level of sexual harassment would therefore seem to offer economic benefits to employers.⁵¹

B. *Costs Imposed on Employers by Compensatory and Punitive Damages*

Employers are concerned that the addition of compensatory and/or punitive damages to Title VII would result in dramatic increases in both the volume of litigation and the size of awards. While it is reasonable to assume that there will be some such increases, it is unlikely that the burdens will be as large as those predicted publicly by opponents of the Civil Rights Acts of 1990 and 1991.⁵²

One of the best indications of the future of litigation and awards is the pre-*Patterson* record of § 1981 claims for race-based employment harassment. In examining employer liability, courts have held that, "[w]hen 42 U.S.C. § 1981 and Title VII are alleged as parallel bases of relief, the same elements of proof

Harassment Among Women in Traditional Male Occupations, 15 SEX ROLES 433, 436 (1986).

47. See sources cited *supra* note 7.

48. See Ken Jennings & Melissa Clapp, *A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases*, 1989 LABOR L.J. 756, 757; William Kandel, *Sexual Harassment: Persistent, Prevalent, But Preventable*, 14 EMPLOYEE REL. L.J. 439, 440 (1988).

49. See Fred Suggs, *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAWYER 176, 180 (1985); Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 HOUS. L. REV. 441, 466 (1988) [hereinafter Note, *Clarifying the Standards*].

50. LaFontaine & Tredeau, *supra* note 46, at 433; see also *Robinson v. Jacksonville Shipyards*, 1991 U.S. Dist. Lexis 794, 43-44 (M.D. Fla. 1991) (describing discriminatory dynamic when women are "rarity" in particular workplace).

51. Given the costs of sexual harassment described above, one could ask whether employers would be economically better off without the "hassle" of having women employees at all. It is unlikely that employers would be able to exclude women from their workplaces without subjecting themselves to substantial liability under Title VII for sex-based discrimination. Even if they were permitted to hire only men, however, any potential economic benefits would surely be offset by losses in productivity. By ignoring a potential workforce that comprises over half of the population, employers would be denying themselves access to some of the most competent and efficient members of the workforce. Similarly, by reducing the pool of potential workers, employers lose bargaining power, possibly resulting in more expensive labor, or less productive labor for the same price. Finally, this question points out the problem limiting a discussion of discrimination to economic analysis. In this instance, any analysis of the economic factors surrounding sexual harassment makes a normative presumption that places the burden of sexual harassment on women, suggesting that it is *their* presence in the workplace, rather than the presence of the harassers, that is the "source" of the disruption.

52. See, e.g., LaFraniere, *supra* note 44, at A16, col. 1 ("Opponents predict the financial incentive will unleash a flood of lawsuits . . .").

are required for both actions.”⁵³ Because the standards of proof and the relief offered are the same, recent § 1981 awards should be indicative of likely awards in future suits employing the same damage provision for sex-based employment discrimination. A survey conducted for the National Women’s Law Center reviewing 576 section 1981 cases between 1980 and 1990 shows that only sixty-eight of these 576 cases resulted in awards of compensatory or punitive damages. And of these sixty-eight, only three resulted in awards of greater than \$200,000.⁵⁴

It is true that there are more women than minorities employed in the United States, which presents a much larger pool of potential plaintiffs. For a number of reasons, however, it is also more difficult to prove sexual harassment. One significant difference is that sexual harassment is more likely to occur in private. Furthermore, courts sometimes allow consent as an affirmative defense to sexual harassment, but not to racial harassment.⁵⁵ Additionally, because a certain amount of sexual banter and “courtship” is currently accepted as a normal occurrence in the American workplace,⁵⁶ a sexual harassment plaintiff is required to demonstrate why the activity complained of is particularly offensive.⁵⁷ Even after a finding of a hostile environment is made, an employer may escape liability altogether if the judge is satisfied that the employer neither knew, nor should have known, of the occurrence of harassment, or if the employer took prompt remedial action upon becoming aware of the problem.⁵⁸ Finally, an employer would be liable for punitive damages under the proposed 1990 and 1991 Acts only if it “engaged in the unlawful employment practice with malice, or with reckless or callous indifference.”⁵⁹

This list of barriers between plaintiffs and recovery suggests that most of the potential costs to employers posed by the amendment could be avoided through sound management. Primarily, employers would be wise to implement effective sexual harassment education, reporting, and discipline policies. In the end, this could be one of the most significant benefits of an amended Title VII, as the goal should be to eliminate workplace harassment, not simply to assist women who already have been harassed in bringing lawsuits. Women

53. *Flanagan v. Aaron E. Henry Com. Health Services Ctr.*, 876 F.2d 1231, 1233-34 (5th Cir. 1989).

54. Wendy White, Daniel Shelton, A. Mechele Dickerson & Jennifer Toth, *Analysis of Damage Awards Under Section 1981* 5 (Mar 14, 1990) (unpublished manuscript, available from the National Women’s Law Center).

55. See generally Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109 (1986) [hereinafter Note, *The Consent Defense*].

56. Note, *Inadequacies in Civil Rights Law*, *supra* note 14, at 1154-59.

57. This is not to suggest that racial harassment must not satisfy any threshold of offensiveness. See *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977). However, the level of judicial and social tolerance for racially harassing behavior seems to be much lower.

58. See EEOC guidelines, *infra* notes 70, 83, and 84. Note, however, that the EEOC, in its brief in *Meritor*, argued against strict liability for employers. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); see also Steve Nelson, *DOJ Brief Departs From Guidelines on Harassment*, Legal Times, Jan. 27, 1986, at 1, col. 1.

59. Civil Rights Act of 1990, *supra* note 9.

who have suffered discrimination must be able to recover compensation, but litigation alone is an inadequate and clumsy method for remedying systemic discrimination.⁶⁰

C. Incentives for Employers under an Amended Title VII

The previously detailed productivity costs of sexual harassment to employers suggest that every rational utility-maximizing employer is already making reasonable efforts to end workplace harassment, and that the added threat of compensatory and punitive damages would not further reduce sexual harassment.⁶¹ Leaving aside the inherent problems of applying rationality assumptions to human actors, there is reason to think that the incentives imposed by the amendments to Title VII would in fact alter employer behavior in a positive way.

Most crucially, the passage of a new Civil Rights Act will educate employers about sexual harassment. Although sexual harassment is not a new phenomenon, only recently has it been recognized as a problem by employers and policy makers. Although the debate surrounding proposed amendments to Title VII has drawn increased attention to the issue of sexual harassment, enactment of a new Civil Rights Act focusing in part upon remedying sexual harassment in the workplace would send a far more powerful and public message to all employers. The high rate of sexual harassment claims received by the EEOC⁶² is evidence that employers are not fully aware of the problem, do not care about sexual harassment, or are unable to reduce the level of harassment in their working environments. Despite the high reported incidence of sexual harassment, it is improbable that most employers are deliberately encouraging or allowing sexual harassment to continue. Corporate managers (along with many other people) tend to ignore potential issues of discrimination until forced to confront them. This phenomenon suggests that many employers currently possess incomplete or inaccurate information about the issue of sexual harassment.⁶³

Enactment of the Civil Rights Act would also give employers added economic incentive to investigate both the nature of sexual harassment in their workplaces *and* possible solutions to the problem. The same employers who have failed to respond to the threat of reinstatement and/or back pay currently provided by Title VII may also fail to react to the addition of compensatory

60. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1215 (1989).

61. See, e.g., Kandel, *supra* note 48, at 440-41; Note, *Clarifying the Standards*, *supra* note 49, at 466-67.

62. See Note, *Inadequacies in Civil Rights Law*, *supra* note 14, at 1160, n.7.

63. For a discussion of the similar model of corporate response to potential tort liability, see Mark Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 14-16 (1986) (tendency among group members to suppress or fail to recognize information contrary to group interests may explain management failure to respond to large liability exposure.).

and punitive damages to the statute. But this seems unlikely, given that most of the actual damages suffered by victims of sexual harassment cannot be remedied through back-pay or reinstatement.⁶⁴ Thus, under a broader remedy system, recalcitrant employers would have to contend with a much larger monetary threat. The intangible costs of sexual harassment would no longer be externalized onto the victim under the proposed law. If there are employers who encourage a sexually harassing environment, they should be subjected to punitive damages. Even invidious discriminators will eventually be swayed by the threat of greater penalties.

Another critical issue is the possibility that increased damages would impact labor relations and contracts for unionized employers. It has become a common phenomenon for arbitrators to reduce or overturn employer sanctions imposed on sexually harassing employees.⁶⁵ At the same time, the federal courts have authority to require employers to grant relief to victims of discrimination that conflicts with union agreements.⁶⁶ In order to avoid union conflicts when attempting to address the problem of sexual harassment, employers will need to take more preemptive actions to reduce harassment prior to the need for sanctions. Additionally, large employers may want to negotiate for a harassment complaint and sanction system as part of the regular collective bargaining process in order to reduce post-sanction appeals by penalized employees and circumvent the likelihood of litigation by harassed employees. Even if an employer faces competing obligations under Title VII and a collective bargaining agreement, the employer has the option of joining the union as a party to the litigation, thus allowing the judge to take responsibility for altering an unacceptable contract.

D. Are These Burdens and Incentives "Fair" to Employers?

It is reasonable to assume that there will be some financial impact on employers as a result of the new damages provision even though the ultimate financial burden is impossible to quantify. Any additional burden imposed on employers for the elimination of workplace discrimination is, however, consistent with equitable legal principles and analogous duties already assumed by employers in other contexts, as well as with the dual purposes of Title VII.

First, placing liability on employers for workplace harassment is consistent with the tort principles supporting strict liability.⁶⁷ This theory of strict liability-

64. See *supra* notes 6-8 and accompanying text.

65. See Jennings & Clapp, *supra* note 48, at 756-57.

66. See *Franks v. Bowman Transp.*, 424 U.S. 747, 774-79 (1976) (granting, under Title VII, retroactive seniority status, despite union contract, to remedy race discrimination). See also *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (criticizing transfer of employee back to original workplace in exchange for agreement to drop union grievance that objected to discipline for sexual harassment); *Newsday v. Long Island Typographical Union*, 915 F.2d 840, (2d Cir. 1990) (vacating arbitrator's award reinstating sexual harasser because arbitrator disregarded public policy against sexual harassment).

67. See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985) (cheapest cost avoider rationale

ty was part of the justification for the creation of the worker's compensation system, which places on the employer the cost of all physical injuries which occur in the course of employment. As with work safety, the employer is the actor in the best position to eliminate workplace harassment. In fact, it is probably *more likely* that employers can have a positive effect on non-work-related behavior like harassment than on work-related accidents, many of which occur as a result of unavoidable workplace hazards.

Secondly, employers can already be held liable for compensatory and punitive damages for employment discrimination based on race. Employers should bear a similar responsibility for all forms of illegal employment discrimination.⁶⁸ Even if Congress does not amend § 1981 to once again apply to on-the-job harassment, only a uniform liability standard for all prohibited harassment under Title VII will ensure that discrimination involving more than one impermissible factor—like race and sexual harassment against a Black woman—clearly qualifies as discrimination.⁶⁹

IV. PROBLEMS BEYOND DAMAGES

Although an amendment to Title VII providing for damages would make more adequate compensation available to successful plaintiffs, it would not resolve many of the important interpretive and evidentiary problems surrounding sexual harassment adjudication. This section outlines the most pressing of these issues.

A. *The Hostile Working Environment: How Hostile Does it Have to Be?*

Although the text of the EEOC's definition of sexual harassment⁷⁰ has now been accepted almost universally by the courts, uncertainty remains as to the amount and severity of harassment needed to create a hostile working environment.⁷¹ The irony of this confusion is that because of the prevalence

justifies strict liability on employers for sex discrimination to prevent the hiring and retention of sexist supervisors.).

68. See Greenberger testimony, *supra* note 38, at 10-11.

69. See Note, *Black Women's Experiences*, *supra* note 40, at 1476-78.

70. The EEOC guidelines state that:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1980).

71. See, e.g., Comment, *A Right with Questionable Bite: The Future of "Abusive or Hostile Work Environment" Sexual Harassment as a Cause of Action for Women in a Gender-Biased Society and Legal System*, 23 NEW ENG. L. REV. 263, 268-72 (1988); Note, *Clarifying the Standards*, *supra* note 49, at 448-58.

of sexually harassing behavior throughout American society and particularly in certain job categories, courts often require plaintiffs to prove an extraordinary level of abuse.⁷² Current applications of Title VII thus seem to protect an acceptable "background level" of harassment.

The conception of sexual harassment as behavior which involves "fine line" as opposed to "bright line" determinations complicates further the question of proof of sexual harassment. It is entirely possible, even likely, that behavior viewed as harassing by the plaintiff is perceived by the defendant and maybe even the judge or jury as "joking" or "normal" behavior. Because of incongruities between the typical perceptions of the victim and the harasser, it does not make sense for the actions in question to be evaluated by a "reasonable person" standard.⁷³ Such a standard is too ambiguous and does not explicitly recognize the possibility that sexual harassment may be carried out through behavior widely perceived as socially acceptable.⁷⁴ A standard that makes more sense within the context of Title VII's goal of eliminating the employment barriers facing victims of discrimination is the viewpoint of a "reasonable woman" or a "reasonable victim."

A reasonable victim standard would take into account the fact that most victims of sexual harassment are women. But it also would be flexible enough to accommodate the multiply disadvantaged woman who belongs to other protected classes, as well as the rare male victims. The real significance of adopting a gendered standard is not simply to recognize that women are the targets of sexual harassment, but to acknowledge that a woman's perception of harassing behavior can be different from that of a man.⁷⁵ Researchers of women's intellectual development have noted that the vast incidence of sexual abuse in this country significantly affects women's "learning and relationships to authority."⁷⁶

Recent cases demonstrate that once the perspective of the victim is recog-

72. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (plaintiff must demonstrate that "reasonable person" would suffer adverse psychological affects under similar circumstances and that plaintiff was actually offended.).

An analysis of the process through which the longstanding and widespread discrimination and abuse inflicted upon a group within a society becomes incorporated into the definitions of "reasonable activity" and "harm" for that society is beyond the scope of this article. It is sufficient to note that the recognition of sexual harassment as a pervasive phenomenon in our society should lead us to question the use of any standard which measures the harm experienced by any particular women by the common experiences of all members of the society.

73. For a lengthy and insightful discussion of the biased nature of the reasonable person standard in sexual harassment doctrine see Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177 (1990).

74. The fact that socially acceptable behavior may nonetheless oppress a particular group within society is easy to comprehend with respect to social practices that are now at a safe distance (e.g., slavery, bride burning, foot-binding or anti-miscegenation laws). Unfortunately, much of the behavior which constitutes sexual harassment today is not actionable because it has not received similar recognition, perhaps because it is too close.

75. Abrams, *supra* note 60, at 1202-03.

76. MARY BELENKY, BLYTHE CLINCHY, NANCY GOLDBERGER, JILL TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* 58 (1986).

nized, courts gain better insight into behavior that is *actually* harassing to women in the workplace regardless of the intentions of the perpetrators. In *Ellison v. Brady*, Judge Beezer of the Ninth Circuit explained the court's rationale for employing a "reasonable woman" test as follows:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.⁷⁷

Of course, even the use of a reasonable woman standard does not completely circumvent the phenomenon of ratifying a certain amount of discriminatory conduct simply because it is pervasive. However, the standard is a flexible one that will hopefully reflect continuing social progress. It is also important to note that a reasonable woman standard sends a meaningful and empowering message to women. For the first time, sex discrimination law is beginning to recognize the scope of permissible treatment in the workplace by reference to what women find intolerable.

B. *The Consent Defense*

Another controversial issue in sexual harassment litigation is the affirmative defense of consent by the plaintiff to the allegedly harassing behavior.⁷⁸ As historically has occurred in rape cases, some sexual harassment defendants argue that failure to object to sexual activity or talk is equivalent to consent.⁷⁹ Even worse, some defendants have argued that a plaintiff's objections could not be taken seriously because other past or present behavior indicated that the defendant's conduct was welcome. It is inappropriate to infer plaintiff's consent short of evidence that she explicitly and affirmatively indicated her consent to

77. *Ellison v. Brady*, 924 F.2d 871, 879 (9th Cir. 1991) (footnotes omitted). This case involved a woman who had received two "love letters," one of them bizarre and threatening, from a co-worker. The case had been dismissed by the lower court for failing to state a claim upon which relief could be granted.

In another case this-year, *Robinson v. Jacksonville Shipyards*, 1991 U.S. Dist. Lexis 794 (1991), the judge employed a reasonable woman test to find that an atmosphere of pervasive sexually-oriented pictures, sexual jokes, and sexual remarks was sufficient to constitute a sexually harassing working environment.

78. See Note, *The Consent Defense*, *supra* note 55.

79. See *id.* at 1120-23.

the defendant.⁸⁰ The EEOC and the courts should therefore employ a strong but rebuttable presumption that any behavior which could be perceived by its object as harassing is unwelcome.

Claims raised by some commentators that such a presumption would stifle "legitimate" sexual overtures in the workplace⁸¹ or, worse yet, impinge on an individual's constitutional right to engage in courtship,⁸² seem vastly overrated. Coerced sexual conduct is not necessary to a successful courtship. Neither does it appear to be an unreasonable restraint on workplace socializing to penalize office aggressors who impose their sexual attentions or sex-stereotyped expectations on unwilling recipients. Elimination of actual harassment in employment can not be accomplished if victims must also fight against a legal system which presumes that their claims are not well-grounded. This is especially critical because sexual harassment often takes place in the absence of third-party witnesses.

C. Employer Liability for Harassment by Non-Superiors

The EEOC guidelines provide for strict employer liability for the harassing actions of its supervisors and agents.⁸³ For the harassing actions of both co-workers and non-employees in the workplace, the guidelines recommend that the employer only be liable for actions of which it was aware or should have been aware. Even then, the employer may still avoid liability if it can show that it took immediate, appropriate corrective actions.⁸⁴

Some commentators have argued that this liability standard places an unfair

80. The Circuit Court in the *Meritor Savings Bank* case recognized the inherently unequal power distributions in the workplace, finding that consent in the face of coercion is not consent. *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985).

81. See Paul, *supra* note 21, at 357-59.

82. See Note, *Inadequacies in Civil Rights Law*, *supra* note 14, at 1155-58.

83. The guidelines state:

Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1980) (emphasis added).

84. The guidelines state:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Id. at § 1604.11(d)-(e).

burden on employers.⁸⁵ Even the EEOC in *Meritor Savings Bank v. Vinson* argued that the employer should only be liable for the supervisors' actions if the employer knew or should have known of the harassment, despite the contrary position of the EEOC's official guidelines.⁸⁶ In *Meritor*, the Supreme Court explicitly refrained from resolving the issue. The Court rejected both the absolute liability standard and the actual knowledge test, simply directing lower courts to principles of agency for guidance in resolving the issue.⁸⁷

A strong argument has been made that, under the current standards, employers can still escape liability by taking a "head in the sand" approach to co-worker harassment.⁸⁸ It is essential that the standards for employer liability provide the maximum incentive for elimination of workplace harassment. Yet it may be unfair and ineffective to hold employers liable for activities and/or situations over which they have no real influence. An intermediate standard between strict liability and the "known or should have known" standards may be the most appropriate. Such a standard might require employers to have an effective harassment reporting mechanism, and might impose a burden upon employers in particular cases to demonstrate that any alleged harassment was beyond the possible reach of the employer's influence.

D. Admissibility of Past Behavior Evidence

In rape cases, victims are protected by Federal Rule of Evidence 412 from misuse of evidence of past sexual behavior.⁸⁹ No comparable rule exists for

85. See, e.g., Paul, *supra* note 21, at 353, 357, 363; Note, *Inadequacies of Civil Rights Law*, *supra* note 14, at 1169.

86. See sources cited in notes 58 and 83.

87. 477 U.S. 57, 69-72. The "principles of agency" comprise a fairly large and non-specific collection of liability concepts. Most courts look to the RESTATEMENT (SECOND) OF AGENCY in making liability determinations.

88. Linda Kreiger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115, 134 (1986); Note, *Employer Liability*, *supra* note 45, at 95-99.

89. Federal Rule of Evidence 412 provides in pertinent part:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) [Evidence] of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence . . . is—

(1) [Constitutionally] required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c) (1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin

(2) The motion described in paragraph (1) shall be accompanied by a written offer of

Title VII litigation of sexual harassment claims, despite the fact that most of the same considerations apply.⁹⁰ The lack of a specific evidence rule restricting the use of sexual history evidence is a serious potential problem in each sexual harassment trial. The problem is compounded by the fact that amendments to Title VII to allow for compensatory and punitive damages would necessitate the use of jury trials at the request of either party.⁹¹ Juries are generally more likely than judges to misinterpret or overemphasize sexual history testimony.⁹²

The use of testimony and even discovery relating to the plaintiff's sexual history will rarely be relevant and can often impede the enforcement of Title VII's prohibition against sexual harassment. In addition to the possibility that juries will misinterpret such evidence, the use of sexual history as a defense to sexual harassment claims reinforces a public perception that harassed women somehow ask for what they receive.⁹³ Furthermore, victims may be discouraged from bringing claims or pressured into dropping or settling meritorious claims due to the threat of public embarrassment through use of sexual history testimony or even pretrial discovery.⁹⁴ Serious commitment to enforcement of a national policy against sexual harassment demands that these victims be accorded the same protections as rape victims against improper use of sexual history evidence.⁹⁵

proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. . . .

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

90. See, e.g., *Priest v. Rotary*, 98 F.R.D. 755, 757-62 (N.D. Cal. 1983) (denying motion to overturn magistrate's protective order disallowing discovery of details of plaintiff's sexual history for ten years prior to alleged incident).

91. See *supra* note 10.

92. Although there have been no studies of jury use of sexual history information in sexual harassment cases, the misuse of sexual history information by juries in rape trials has been demonstrated. Arnie Cann, Lawrence Calhoun & James Selby, *Attributing Responsibility to the Victim of Rape: Influence of Information Regarding Past Sexual Experience*, 32 HUMAN RELATIONS 57 (1979) (empirical study of jury misuse of sexual history information in rape trials). See also Catherine O'Neill, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. CHI. LEGAL FORUM 219, 229 (discussing the likelihood of jury misuse of sexual history information in sexual harassment litigation).

93. See O'Neill, *supra* note 92, at 232.

94. See *Priest v. Rotary*, 98 F.R.D. at 761.

95. In only one instance will sexual history or reputation evidence be relevant as evidence during a sexual harassment trial when it would not be during a rape trial. A plaintiff's own workplace conduct and reputation conceivably may be considered relevant to the question of whether or not a sexually charged work atmosphere was *actually* offensive to plaintiff. Even this evidence would not be as relevant if the standard is one of a "reasonable woman," however, because a plaintiff's subjective response to the behavior in question is less likely to be divergent from an objective "reasonable woman" test.

V. IMPLEMENTATION OF THE PROPOSED IMPROVEMENTS IN TITLE VII

Although many of the proposed changes in and amendments to Title VII discussed in this article would pose few implementation issues, an amended prohibition against sexual harassment will present new complexities which should be addressed either through additional legislation, EEOC guidelines, or judicial interpretation. This section addresses the three most serious of these issues: additional burdens on the judicial system, the jury trial requirement, and level of damages assessments.

A. *Additional Burdens on the Judicial System*

One of the most common objections to an increase in available damages under Title VII is that it will place a greater burden on the federal judicial system, both because the possibility of damages will trigger a number of new cases and because increased caseloads and the jury requirement will complicate the judicial resolution of all sexual harassment claims brought under Title VII.⁹⁶ Although the possibility of compensatory and punitive damages does present a new wrinkle to Title VII claims, it is not a radical change from the past. The amendment merely brings Title VII into line with the damages previously available to victims of employment discrimination under § 1981 and to victims of state-sponsored employment discrimination under § 1983.

As discussed earlier, it is unlikely that the amendments will result in frequent and large punitive damage awards.⁹⁷ The possibility of recovering compensatory damages, however, may well provide a stimulus for additional sexual harassment claims.⁹⁸ This result is probable because under existing Title VII law, there is little incentive for a sexual harassment victim with a valid claim to bring suit unless she can show substantial economic injury.⁹⁹ The fact that more actual victims of sexual harassment may be encouraged to file claims is certainly not a sensible reason to oppose amendment to Title VII. Any additional burdens imposed on the judicial system are justified by the worthwhile goal of eliminating workplace sexual harassment.

It should be noted, however, that the fact that more adequate compensation may be available to victims of sexual harassment does not guarantee the filing of additional claims. It is possible that the increased Congressional emphasis

96. See, e.g., *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1264 (1971); LaFraniere, *supra* note 44, at A16, col. 1. The Bush Administration's own proposed civil rights bill does not allow for jury trials for sexual harassment, apparently due to fear of creating a "lawyer's bonanza." Clymer, *supra* note 32, at A10, col. 6.

97. See *supra* notes 52-60 and accompanying text.

98. See Dworkin, Ginger & Mallor, *supra* note 19, at 131.

99. See *Mitchell v. OsAir*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) ("There is little incentive for a plaintiff to bring a Title VII suit when the best she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit."). See also *supra* notes 4-6 and accompanying text.

on the problems of sexual harassment, combined with the threat of larger damage awards, will encourage more employers to take preemptive action to eliminate harassment. Even after claims have been filed, the threat of larger damage awards will increase the incentives for employers to settle suits prior to adjudication. Thus, there is simply no hard evidence to support the claim that federal courts will be flooded with Title VII claims if increased damages become available.

B. Jury Trials

Commentators have suggested that Title VII employment discrimination cases present complex and technical questions that are beyond jurors' competence.¹⁰⁰ But there is no evidence that jury trials have been problematic under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act, both of which allow for jury trial and are administered and enforced by the EEOC in a virtually identical manner to Title VII.¹⁰¹ In fact, the Ninth Circuit already requires that courts follow the implicit and explicit factual determinations made by juries in cases combining Title VII claims with those based on § 1981.¹⁰²

The more important issue regarding jury trials of sexual harassment claims is the potential amplification of problems which currently exist in sexual harassment litigation and are not posed by other types of employment discrimination cases. First, it is imperative that sexual harassment plaintiffs be protected from use of sexual history or reputation evidence in a jury trial.¹⁰³ Second, because of the ambiguity currently surrounding the standard for judging harassing conduct,¹⁰⁴ the courts should promptly adopt a "reasonable woman" or "reasonable victim" standard.¹⁰⁵

C. Level of Damages

Sexual harassment litigation may also present damages issues not present in other employment discrimination cases. For example, hostile work environment harassment is currently treated by the EEOC in an identical manner as *quid pro quo* harassment.¹⁰⁶ However, some courts have indicated that they view *quid pro quo* harassment as a more serious problem than a hostile work environment.¹⁰⁷ It will be up to individual juries to make that determination

100. See *Developments in the Law*, *supra* note 96, at 1260.

101. See Note, *Restoring Title VII*, *supra* note 5, at 1629-30.

102. *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990).

103. See *supra* notes 89-95 and accompanying text.

104. See *supra* notes 70-77 and accompanying text.

105. See *supra* note 77 and accompanying text.

106. See EEOC guidelines on employer liability, *supra* notes 83, 84.

107. See Note, *Employer Liability*, *supra* note 45, at 95-96.

through damage awards under the proposed new law.

A second issue which will undoubtedly arise is the relevance of the individual plaintiff's character to the determination of damages. It seems likely that defendants will want to introduce evidence indicating that plaintiff was not actually offended by a work environment which would be offensive to the reasonable victim.¹⁰⁸ Alternatively, defendants will want to argue that because of a particular plaintiff's promiscuity, the coerced sexual acts were not damaging to her.¹⁰⁹ EEOC guidelines should explicitly address this potential problem, and judges should be vigilant in disallowing such inappropriate and offensive lines of argument.

VI. CONCLUSION

The sexual harassment prohibition of Title VII provides meaningful assurance to millions of American workers. Nonetheless, Title VII currently provides inadequate protection or remedy. The proposed amendments to Title VII contained in the Civil Rights Acts of 1990 and 1991 offer a necessary remedy that is currently unavailable. Despite President Bush's veto last year, there is apparent bipartisan agreement that Title VII should be altered to improve its effectiveness as a bar against sexual harassment.¹¹⁰ However, the politicians and civil rights leaders involved in the debate over the Civil Rights Act of 1990 missed many important issues.

The unique nature of sexual harassment poses particular challenges for implementation of Title VII's protections which should be carefully addressed. Both the addition of compensatory and punitive damages, and the correction of the additional evidence and standards problems outlined in this article, are necessary if Title VII is to achieve its dual goals of prohibiting the occurrence of employment discrimination, and making the victims of such discrimination whole.¹¹¹

108. See O'Neill, *supra* note 92, at 236.

109. *Id.*

110. See *supra* note 10.

111. See *Mitchell v. OsAir*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) (Congressional action is necessary to improve adequacy of Title VII's prohibition of sexual harassment and its remedy to victims.).